No. 89-390 (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The Pension Benefit Guaranty Corporation ("PBGC") is a federal government corporation charged by Congress with administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974, including the pension plan termination insurance program. In the present case, in order to prevent the shifting of over $2 billion in liabilities to the insurance program it administers, PBGC restored certain pension plans that it had previously terminated. That action was vacated by the district court and the court of appeals affirmed. The questions presented are:

1. Where PBGC is statutorily authorized to restore terminated pension plans "in any such case in which [PBGC] determines such action to be appropriate and consistent with its duties under [ERISA]," 29 U.S.C. § 1347, may a reviewing court foreclose the agency from considering whether restoration is appropriate to remedy abuse of the insurance program?

2. May a reviewing court substitute its judgment for PBGC's as to the appropriate considerations for restoration on the basis of improved financial circumstances?

3. May a reviewing court vacate a restoration decision under 29 U.S.C. § 1347 because PBGC focused "inordinately" on ERISA and failed to defer to selected policies underlying the bankruptcy and labor laws?

4. When an agency takes informal administrative action under a statute that sets forth no procedural requirements for exercise of its authority, may a reviewing court substitute its judgment for the agency's as to the appropriate procedures to be followed?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 875 F.2d 1008, and is reprinted at pages 1a-27a of the Appendix to this Petition ("Pet. App.").[1] The judgment of the United States

[1] The Appendix is bound in a separate volume.

District Court for the Southern District of New York dated September 13, 1988, from which appeal was taken, and the district court's opinion of June 22, 1988, reported at 87 Bankr. 779, are reprinted at Pet. App. 132a and 28a-131a.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1989. Pet. App. 1a. On August 1, 1989, Justice Marshall granted an extension of time within which to file a petition for certiorari until and including September 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 4002, 4041, 4042 and 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1302, 1341, 1342 and 1347, which are set forth at Pet. App. 133a-157a.[2]

STATEMENT OF THE CASE

This case concerns the efforts of the PBGC to prevent large companies from abusing the pension plan termination insurance program by shifting billions of dollars in pension liabilities to the PBGC while effectively continuing their pension plans. Faced with a rapidly-rising deficit and ever-increasing premiums, the PBGC acted in September 1987, pursuant to its broad authority under Section 4047 of ERISA, to return to The LTV Corporation and its wholly-owned subsidiary, LTV Steel Company, Inc. (collectively "LTV"), three purportedly terminated pension plans with unfunded liabilities of over $2 billion. The PBGC did so to prevent abuse of the pension insurance program and because LTV's financial circumstances no longer justified termination. The court of appeals, however, affirmed a district court ruling vacating PBGC's action. Review is necessary because the court's decision, and the rationale underlying it, could have a crippling impact on the pension insurance program.

[2] ERISA was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986) ("SEPPAA"), and again in 1987 by the Pension Protection Act, Pub. L. No. 100-203, title IX, subtitle D, part II, 101 Stat. 1330-333 (1987) ("PPA"). Because the PPA amendments do not apply in this case, citations to ERISA herein are to the statute as amended by SEPPAA, as found in 29 U.S.C. (1982 and Supp. IV 1986), unless otherwise expressly noted.

Statutory Background

The PBGC is a wholly-owned United States government corporation, with a Board of Directors composed of the Secretaries of Labor, Treasury and Commerce. 29 U.S.C. §§ 1301 *et seq.*[3] Modeled after the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation, the PBGC and its insurance program were established in 1974 "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (quoting 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen)). Thus, PBGC protects the pension benefits of the 30 million American workers in the private sector who participate in single-employer defined benefit pension plans.

When a covered pension plan terminates with insufficient assets to satisfy promised benefits, the PBGC becomes trustee of the plan, takes over the plan's assets and liabilities, and, subject to statutory limitations, pays all "nonforfeitable" benefits, *i.e.*, those benefits to which participants have earned entitlement under the plan terms as of the date of termination. 29 U.S.C. §§ 1301(a)(8), 1322(a), (b). Active plan participants cease to earn additional benefits under the plan and lose entitlement to

[3] The PBGC has independent litigating authority. 29 U.S.C. § 1302(b)(1).

most benefits not yet fully earned on the date of plan termination. Retired participants lose benefit amounts in excess of the amount insured by PBGC. *See* 29 U.S.C. § 1322; 29 C.F.R. pt. 2621 (1988).

In fiscal year 1988, the PBGC paid $324.7 million in insured benefits to 113,000 participants in 1,476 terminated single-employer pension plans. The cost of this insurance is borne primarily by employers who maintain ongoing pension plans, who are required by statute to pay annual premiums. 29 U.S.C. §§ 1306, 1307. The insurance program is also financed by statutory liability imposed on employers who terminate underfunded pension plans. Upon termination, the employer becomes liable to the PBGC, generally for 75 percent of the amount by which the plan is underfunded for the benefits that PBGC insures. *See* 29 U.S.C. § 1362(b). However, because PBGC historically has recovered only a small portion of that liability, Congress repeatedly has been forced to increase the annual premiums.[4] Despite these repeated increases, in its most recent Annual Report PBGC reported liabilities of $4 billion and assets of only $2.4 billion, leaving a deficit of more than $1.5 billion, exclusive of the liabilities at issue in this case.

Plan termination is the insurable event under Title IV. Plans may be terminated "voluntarily" by an employer or "involuntarily" by the PBGC. Title IV permits voluntary terminations only if not barred by the terms of an existing collective bargaining agreement and, in the case of an underfunded plan, only if the employer meets detailed financial distress tests. 29 U.S.C. § 1341(a)(3), (c). The PBGC may, however, involuntarily terminate a pension plan, notwithstanding a collective bargaining agreement. It may do so if it determines, for example, that a plan has not met ERISA's minimum funding standards or that the risk to the insurance program may otherwise increase unreasonably. 29 U.S.C. § 1342(a).

[4] Premiums originally were fixed at an annual rate of $1.00 per participant in 1974. ERISA § 4006(a)(3), 88 Stat. 829 (1974). The rate was raised in January 1978 to $2.60. Pub. L. No. 95-214, 91 Stat. 1501, 1502 (1977). With the enactment of SEPPAA in 1986, the premium was raised to $8.50. SEPPAA § 11005(a)(1), 100 Stat. 240-41 (codified at 29 U.S.C. § 1306(a)(3) (Supp. IV 1986)). And under PPA, the variable rate premium ranges from $16 to $50 per participant. PPA § 9331(a), (b), 101 Stat. 1330-367 to 1330-368 (codified at 29 U.S.C. § 1306(a)(3) (Supp. V 1987)). Congress plainly did not anticipate, when it first established this insurance program, the volume and size of claims the program would be required to assume.

Once a plan has been terminated, PBGC retains broad authority to reinstate it. Thus, Section 4047 of ERISA provides that:

> In the case of a plan which has been terminated under section 4041 or 4042 [29 U.S.C. §§ 1341, 1342], the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under [Title IV of ERISA], to take such action as may be necessary to restore the plan to its pretermination status . . . .

29 U.S.C. § 1347. When a plan is restored, full plan benefits and accruals are reinstated, and the employer, rather than PBGC, is again responsible for the plan's unfunded liabilities.

The PBGC has determined restoration to be "appropriate and consistent with its duties under Title IV" where an employer terminates a pension plan in order to take advantage of Title IV insurance, but then establishes "follow-on" pension arrangements that make up the benefits the PBGC does not insure. In such circumstances, the combination of PBGC insurance payments and follow-on benefits allows employers to provide substantially the same benefits as if no termination had occurred. The result is a PBGC subsidy for an employer's ongoing benefit program. This may be illustrated by the case of a

plan participant who was receiving $1200 per month in benefits before plan termination. If $800 of that amount is insured under Title IV, the PBGC will pay the $800, while the employer makes up the $400 difference through follow-on plans. Plan assets may be available to cover $200 of the $800 that is insured, leaving the insurance program responsible for $600, except to the extent of PBGC's recovery from the employer. And, although the PBGC is generally entitled to claim 75% of its $600 from the employer, the agency historically recovers only pennies on the dollar. The employer has thus succeeded in shifting significant unfunded pension liabilities to the PBGC, while continuing to provide equivalent ongoing benefits at a substantially reduced cost.

The PBGC has determined that such follow-on pension arrangements abuse the pension insurance program because they negate Title IV's insurable event—termination. Congress crafted the single-employer insurance program to provide certain basic benefits under plans that actually terminate, not to provide supplemental financing for an employer's ongoing pension program.[5] Therefore, as a previous Chairman of PBGC's Board of Directors, former Secretary of Labor William E. Brock, stated in 1987, the PBGC and its Board of Directors "have long opposed abusive follow-on retirement arrangements, which use termination insurance funds to help pay the cost of an ongoing retirement program." AR 1583, Pet. App. 180a.[6] In fact, beginning as early as 1981, the agency warned in three cases involving separate employers that the establishment of follow-on arrangements would negate or

[5] *Compare* 29 U.S.C. § 1431 (requiring PBGC to "provide . . . financial assistance" to ongoing *multiemployer* plans that are experiencing financial hardship).

[6] The designation "AR" refers to the administrative record of the PBGC's restoration decision. This 1592-page record, excerpts from which are included at Pet. App. 159a-183a, was an Exhibit to the Joint Appendix filed in the court of appeals. The "AR" page numbers are identical to the Joint Appendix Exhibit page numbers.

preclude the termination of the pension plans at issue, and could result in restoration of already-terminated plans under section 4047 of ERISA. PBGC Opinion Letter 81-11, Pens. Rep. (BNA) No. 367 at R-3 (May 11, 1981), LEXIS, Labor Library, PBGC file, AR 198 (Pet. App. 159a); PBGC Opinion Letter (unpublished) (April 24, 1981), AR 204 (Pet. App. 165a); PBGC Opinion Letter 86-27, 14 Pens. Rep. (BNA) No. 10 at 306 (Dec. 17, 1986), LEXIS, Labor library, PBGC file, AR 211 (Pet. App. 172a).

Facts and Proceedings

This case arose after The LTV Corporation ("LTV Corp.") and many of its subsidiaries, including LTV Steel Company, Inc. ("LTV Steel"), filed petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York in July 1986. Pet. App. 6a-7a. At that time, LTV Steel sponsored three defined benefit pension plans ("the Plans"), two of which had been negotiated in collective bargaining with the United Steelworkers of America ("USWA" or "union"). Historically underfunded, the Plans had, by late 1986, total unfunded liabilities for promised benefits of almost $2.3 billion, including approximately $2.1 billion in benefits covered by PBGC insurance. AR 8.

"LTV readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations." Pet. App. 101a. This could happen only if the Plans were terminated, with the PBGC assuming responsibility for the unfunded liabilities, and new pension arrangements could be negotiated. LTV, however, could not terminate the Plans voluntarily because the USWA objected to termination, and because LTV could not satisfy Title IV's financial distress tests. *See* AR 407-10; 29 U.S.C. § 1341(a)(3), (c). LTV therefore sought to have the PBGC terminate the Plans. AR 409-10.

In December 1986, LTV advised the PBGC that the company could not and would not fund the Plans. AR 229. Without additional funding, PBGC's internal working group estimated that the $2.1 billion in underfunding would increase by $65 million by December 1987 and by another $63 million by December 1988, unless the Plans were immediately terminated. AR 8. Moreover, extensive plant shutdowns were projected that would have required the payment of "shutdown benefits," increasing the Plans' liabilities by as much as $300 to $700 million. AR 9.[7] The PBGC estimated that up to $500 million of that amount was covered by PBGC insurance. *Id.* Consequently, the PBGC determined that the Plans should be terminated because "the possible long-run loss of the corporation with respect to the plan[s] [could] reasonably be expected to increase unreasonably if the plan[s] [were] not terminated." 29 U.S.C. § 1342(a). AR 10. The PBGC accordingly commenced termination proceedings in the United States District Court for the Southern District of New York, and, with LTV's consent, the Plans were terminated effective January 13, 1987. AR 1533-41.[8]

Because Plan participants lost benefits as a result of the termination, the USWA filed an adversary action against LTV in the bankruptcy court, challenging the

[7] Under the Plans, a plant shutdown makes certain participants eligible for "shutdown benefits," accelerating their entitlement to a normal retirement pension, with no reduction in the amount of that pension to reflect the earlier benefit commencement date. Because the PBGC guarantees only "nonforfeitable" benefits to which participants are entitled on the date of plan termination, shutdown benefits are not insured if the shutdown occurs after termination. 29 U.S.C. §§ 1301(a)(8), 1322(a).

[8] On or about November 24, 1987, the PBGC filed proofs of claim in the bankruptcy court for the liabilities resulting from the termination of the Plans, contingent on the outcome of the restoration litigation. LTV and its creditors are vigorously opposing these claims, and the matter has yet to be adjudicated.

terminations and asking LTV to make up the lost benefits. *See* AR 242. In settlement of that action, LTV Steel and the union negotiated an interim collective bargaining agreement that included new pension arrangements specifically designed to continue service under the terminated Plans and to make up benefits lost under those Plans. AR 237, 239-42, 1561-64.

From at least the time these new benefit arrangements were first tentatively negotiated in May 1987, the PBGC advised LTV that they violated the PBGC's longstanding policy against abusive "follow-on" plans. AR 195-96. The PBGC met with LTV and union representatives on July 9, 10 and 13, 1987 to discuss the follow-on plans. AR 649-56, 1572. In these meetings, the PBGC advised LTV and the union of alternative arrangements they could adopt to provide relief to retirees and employees without abusing ERISA. *Id.* Even though it knew restoration was an option for the agency, LTV rejected this advice. Instead, LTV asked the bankruptcy court to approve the follow-on plans in the collective bargaining agreement and virtually identical follow-on plans for its salaried employees. AR 230. At a hearing on July 16, 1987, PBGC's Executive Director and another agency official submitted detailed affidavits explaining again the PBGC's objections to the plans, AR 190-227, and the Executive Director was cross-examined about these objections. AR 592-604. The bankruptcy court nevertheless approved the establishment of the follow-on plans. AR 624, 1554-56. In doing so, the bankruptcy court noted that PBGC "may have legal options or avenues that it can assert administratively . . . to implement its policy goals. Nothing done here tonight precludes the PBGC from pursuing these options . . . ." AR 623.

By early August, 1987, each of the financial factors on which the PBGC had relied in terminating the Plans had changed significantly. AR 643-45, 503-04. The steel industry, including LTV Steel, was experiencing a dra-

matic financial turnaround, contrary to the predictions of experts in late 1986. Consistent with this turnaround, and in contrast to LTV's earlier claim that it could not and would not fund the Plans, LTV had sought and obtained bankruptcy court approval to fund the new follow-on plans at a cost of at least $90 million per year. AR 643.[9] Finally, an LTV official had testified in the bankruptcy court that, with one exception, no facilities would be shut down in the next several years. AR 503-04, 644. The PBGC therefore no longer faced the imminent risk, central to its decision to terminate the Plans, of substantial additional unfunded liabilities for guaranteed shutdown benefits.

In September 1987, PBGC's internal working group recommended that the agency's Executive Director restore the Plans. AR 631. Before making a decision, the Executive Director consulted the PBGC's Board of Directors. After discussing the facts of the LTV case, and its historic opposition to abusive follow-on arrangements, the Board affirmed the authority of the Executive Director to determine when particular plans should be restored. AR 1582-84, Pet. App. 180a-81a.

Thereafter, the Executive Director offered to meet with LTV to "consider any additional information you might wish to supply." AR 1572. LTV and PBGC representatives then met on September 19 and 21, 1987. AR 1573, 1575. At these meetings, LTV expressed concern about the timing of any restoration decision, and, without offering any new information relevant to PBGC's decision, simply stated that the economic effect of restoration would be unclear, and that restoration would give rise to time-consuming litigation, casting doubt on the bankruptcy reorganization and imposing hardship on other creditors. AR 1575.

[9] It also had sought and obtained bankruptcy court approval to contribute approximately $90 million in cash and stock to a previously-established employee benefit program. AR 645.

The Executive Director issued a Notice of Restoration on September 22, 1987, based on LTV's establishment of abusive follow-on plans, its financial improvements, and its willingness to fund new pension arrangements. AR 1578, Pet. App. 181a. Restoration meant that the Plans were ongoing, and that LTV was again responsible for administering and funding them. When LTV refused to comply with the restoration, the PBGC brought an enforcement action in the United States District Court for the Southern District of New York on October 9, 1987. Pet. App. 51a-52a. Meanwhile, LTV filed an action in the bankruptcy court alleging that the restoration violated the automatic stay provision of the Bankruptcy Code in 11 U.S.C. § 362(a). Pet. App. 34a. After the district court granted the PBGC's motion to withdraw LTV's action from the bankruptcy court pursuant to 28 U.S.C. § 157(d), it considered both actions together. Pet. App. 34a. The court denied LTV's motion for enforcement of the automatic stay, but vacated the PBGC's restoration decision. Pet. App. 131a. On appeal, a panel of the United States Court of Appeals for the Second Circuit affirmed the district court's decision. Pet. App. 2a.

The Decision of the Court of Appeals

The court of appeals agreed with the district court that restoration is a governmental regulatory action, exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4). Pet. App. 24a. The court held, however, that the PBGC's decision to restore the Plans was arbitrary and capricious because the PBGC "focused inordinately on ERISA" and failed to honor the "policies and goals" of other laws. Pet. App. 17a.

In the alternative, and despite the broad grant of discretion in section 4047 of ERISA, the court held that the PBGC lacks statutory authority to restore pension plans on the basis of follow-on abuse because "[t]he legislative history of section 4047 reveals no indication that Con-

gress intended the establishment of successive benefit plans to be a ground for restoration." Pet. App. 17a.

Although the court agreed with the PBGC that "improvement in financial circumstances is a basis for restoration," Pet. App. 21a, it rejected the PBGC's financial standard and adopted one of its own. The PBGC based restoration on the fact that each of the financial factors that had necessitated termination had changed, and therefore plan termination and the payment of PBGC's guarantee was no longer justified. The court, however, decided that restoration for improved financial circumstances may be based only on "the long term ability of LTV to fund the Plans." Pet. App. 24a. Here, the court decided, "LTV's apparent ability to fund the Plans suffers" because "any claims arising out of LTV's obligation to pay into the pension fund plans are prepetition debts" that cannot be paid except in a proportional distribution with other general unsecured creditors pursuant to a plan of reorganization. Pet. App. 23a-24a.

Finally, the court held that the PBGC's decision, which was reached through informal adjudication, was arbitrary and capricious because the agency's procedures were inadequate. Pet. App. 26a.

Accordingly, the court affirmed the judgment of the district court, and remanded the case to the PBGC. Pet. App. 27a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW SERIOUSLY THREATENS THE FEDERAL PENSION INSURANCE PROGRAM.

The decision of the court of appeals invalidates a longstanding agency policy, allows LTV to shift $2 billion in pension liabilities to an already debt-laden federal insurance program, and requires a remand in which the PBGC, foreclosed from considering LTV's establishment of abusive follow-on plans, must apply an unreliable

financial standard and subordinate its statutory mandate to other interests. These rulings threaten to paralyze the agency's efforts to control abuses of the national pension insurance system. They afford financially troubled employers easy access to pension insurance funds while such employers continue to provide identical retirement benefits to their employees. If the decision of the court of appeals is not reversed, other companies will follow LTV's example and use pension insurance as a subsidy to reduce costs and gain a competitive edge. PBGC could then become an open-ended source of industry bailouts, unlegislated by Congress, with escalating costs to premium payers and ultimately workers. The result will be a fundamental transformation of the PBGC's role and a dramatic increase in the PBGC's liabilities that could lead to a financial crisis similar to that currently facing the FSLIC.

Many of the nation's private pension plans are substantially underfunded, often by hundreds of millions or, as in this case, billions of dollars.[10] The most severely underfunded plans generally are maintained by employers who are themselves in significant financial difficulty, and, often, in bankruptcy.[11] These plans present virtually the same financial risk to the agency as the

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[10] Although Title I of ERISA and section 412 of the Internal Revenue Code impose statutory minimum funding requirements for pension plans, a plan can become seriously underfunded even if those requirements are fully met. For example, LTV was in full compliance with these minimum funding requirements until it filed for bankruptcy in July of 1986, yet its Plans were underfunded at that time by more than $2 billion.

[11] According to their 1988 annual reports, the pension plans of at least 17 large companies each have accumulated benefit obligations exceeding plan assets by more than $100 million. C. Vosti, *Funded Status Slipped in 1988*, Pensions & Investment Age 30-31 (July 24, 1989). The financial difficulties of several of these companies have been widely reported.

Plans in this case, and termination of even one of them would create a severe drain on the pension insurance program. This, in turn, would cause higher and higher premiums to be imposed on the plan sponsors that remain. In addition, because pension costs today constitute one of the most significant components of overall production costs, a company that continues to assume its pension burden, while other firms in its industry are obtaining a government subsidy, is at a significant competitive disadvantage. Faced with both competitive pressures and higher premiums, sponsors with well-funded plans will terminate their plans or convert them to defined contribution plans not covered by Title IV, leaving the pension insurance program with an even greater burden and a smaller base of healthy premium payers. Indeed, this is already occurring. *See* J. Chernoff, *Crushed by the Weight*, Pensions and Investment Age 1, 55 (September 4, 1989).

The decision here already has been relied upon by employers and unions in other cases before the agency or in litigation.[12] In the Wheeling-Pittsburgh Steel Corporation bankruptcy, for example, where PBGC has been

[12] Unions historically have opposed plan terminations because of the benefit losses that result from termination. These losses operate like coinsurance in the private sector, *see* R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989), where coinsurance is a common feature. As in the private sector, their purpose is "to discourage overutilization of services by the insured," thereby keeping the cost of insurance at a manageable level. C.A. Williams, Jr. and R. Heins, *Risk Management and Insurance* 484 (6th ed. 1989). *See also* J. Athearn, S.T. Pritchett, and J. Schmit, *Risk and Insurance* 321, 346 (6th ed. 1989). After the court of appeals' decision, however, unions can be expected readily to consent to termination if their members' benefits can be substantially recreated through follow-on plans. In that event, Title IV insurance will be used to subsidize collectively-bargained wages and benefits other than the pension benefits previously promised and now paid primarily by the PBGC. Thus, if follow-on plans are permissible, plan termination is advantageous for both employers and unions.

forced to assume plans with an aggregate deficiency of more than $497 million, Wheeling-Pittsburgh and the USWA are seeking a declaratory judgment that the post-termination implementation of follow-on plans negotiated in collective bargaining is permissible under Title IV. *USWA v. PBGC (In re Wheeling-Pittsburgh Steel Corp.)*, Bankr. No. 85-793, Civil No. 87-355 (W.D. Pa.). In papers filed on June 8, 1989, both plaintiffs argued that the LTV decision dispositively resolves the permissibility of follow-on plans under Title IV. The bankruptcy court, to which the district court had referred the case for recommended findings of fact and conclusions of law, agreed. *USWA v. PBGC, supra*, (Bankr. W.D. Pa. June 30, 1989). Quoting extensively from the LTV decision,[13] that court recommended that the district court approve implementation of the follow-on plans. The bankruptcy court further recommended that the district court enter a preliminary injunction allowing implementation of the follow-on plans pending a final decision on the merits. Five days later, on July 5, 1989, the district court issued a preliminary injunction permitting implementation of the follow-on plans enjoining PBGC from restoring the previously terminated plans.

In another case, the USWA is insisting, as a condition to agreeing to termination, that a company establish follow-on plans. Before the decision in this case, the PBGC believed that the parties would not pursue the matter, but now they are threatening the agency with litigation. Other similar cases are pending.[14]

[13] The bankruptcy court quoted verbatim fourteen paragraphs of the LTV opinion, describing it as "authoritative, directly on point, and so cleanly and clearly drafted that we have not the temerity to attempt an improvement." *Id.*, slip op. at 11 n.4.

[14] Some of these cases involve proposed terminations under the Title IV amendments effected by the 1987 Pension Protection Act. Thus, although extensive, those amendments plainly do not amelio-

Until the decision in this case, the PBGC's follow-on policy was an effective deterrent to abuse of the pension insurance program. After the agency first articulated its views on abusive follow-on plans in 1981, the president of the United Autoworkers Union ("UAW") recognized the financial threat to the agency posed by such plans. In a letter to the union's national staff (Pet. App. 184a), he advised UAW negotiators that follow-on plans were neither "desirable [n]or feasible," and urged them to consider instead such alternatives as funding waivers from the IRS or suits to enforce the employer's pension funding obligations under its collective bargaining agreement. Thereafter, the union actively pursued funding of the benefits promised its members. *See, e.g., International Union v. Keystone Consol. Indus.*, 793 F.2d 810 (7th Cir.), *cert. denied*, 479 U.S. 932 (1986).

Similarly, before PBGC's prompt and decisive response to LTV's abusive follow-on plans, Bethlehem Steel Corp., whose pension plans were then underfunded by over $2 billion, noted in an SEC filing dated September 15, 1987 that it was "carefully monitor[ing] the effects of filings by some of its competitors of petitions for reorganiza-

rate the risk that follow-on plans pose to the pension insurance program. For example, although PPA substantially tightened ERISA's statutory minimum funding requirements, it will be many years, if ever, before the amendments eliminate the huge underfunding that currently exists in a number of plans. PPA also increased the liability owed to the PBGC by employers who terminate underfunded plans to 100 percent of benefit liabilities. Even under PPA, however, as under the law in effect pre-PPA, much of PBGC's claim is typically a general unsecured claim under bankruptcy law, for which the PBGC generally recovers only a few cents on the dollar. And, although PPA imposes more stringent criteria that should make it more difficult for employers to terminate underfunded pension plans voluntarily, PBGC has no experience under the new law to indicate how it will be interpreted by the courts. Moreover, the risk that employers will, as in this case, take actions to compel an involuntary termination by PBGC, will continue in any event.

tion" in order to determine its own course of action.[15] In the wake of PBGC's restoration action, however, Bethlehem made additional contributions to its pension plans, greatly in excess of its statutory minimum funding obligation, reducing substantially the underfunding.

By eliminating this deterrent and requiring PBGC to subordinate its ERISA goals to perceived policies underlying other laws, the court's decision places the pension insurance program in serious financial jeopardy. Because this result is so dangerous for the workers and retirees protected by the program and so antithetical to the goals Congress expressed in ERISA, it must not be allowed to occur.

II. CONTRARY TO THIS COURT'S DECISIONS, THE COURT OF APPEALS MISAPPLIED FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW TO RESTRICT THE PBGC'S BROAD STATUTORY AUTHORITY.

A. In concluding that PBGC may not use its restoration authority to remedy abuse, the court of appeals ignored this Court's rulings on judicial review of agency interpretations and the use of legislative history.

In section 4047, Congress delegated to the PBGC exceedingly broad discretion to determine when terminated pension plans should be restored. Ignoring the plain statutory terms, however, the court of appeals relied on the *absence* of legislative history to conclude that the

[15] In this filing, the company stated: "[F]or a number of reasons, including the beneficial impact on costs of such competitors as a result of these [Chapter 11] filings and the potential improvement of Bethlehem's overall competitiveness through the possible reduction of certain of its contractual, *pension*, social insurance and other financial obligations, Bethlehem has studied the relief and protection that might be available to it under Chapter 11." Preliminary Prospectus of Bethlehem Steel Corp. dated September 15, 1987 for 12,000,000 shares of Common Stock (emphasis added).

PBGC may not base restoration on the establishment of abusive follow-on plans.

The court's analysis conflicts with the standard of review this Court established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which a court must accept an agency's interpretation of its governing statute unless the interpretation is explicitly *foreclosed* by a clearly expressed legislative intent or is unreasonable. Here, far from foreclosing PBGC's interpretation, the legislative history explicitly confirms the breadth of the agency's discretionary authority. The 1974 legislative history states that the PBGC may restore a pension plan where "the employer and plan enjoy[] a favorable reversal of business trends, *or if some other factor ma[k]e[s] termination no longer advisable.*" H.R. Conf. Rep. No. 1280, 93d Cong., 2d. Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58 (emphasis added). The legislative history to the 1986 amendments to section 4047 states that restoration is appropriate to block abuses of the pension insurance program. 132 Cong. Rec. 4887 (1986) (statement of Sen. Nickles).[16]

[16] The court of appeals, however, relied on the fact that "the legislative history of SEPPAA bears no indication that Congress considered the establishment of follow-on plans subsequent to an involuntary termination to be a ground for restoration." Pet. App. 18a. The court, moreover, agreed with the district court that the opinion letters setting forth the PBGC's policy against abusive follow-on plans were "too factually dissimilar from the instant case to be of substantial assistance here" because the opinion letters all involve voluntary rather than involuntary terminations. Pet. App. 20a. However, in this case and any other case where an employer attempts to establish post-termination abusive follow-on plans, the voluntary/involuntary distinction has no legal or practical basis. Because one of PBGC's duties is to limit the transfer of unfunded pension liabilities onto the single-employer pension insurance program to "cases of severe hardship," SEPPAA § 11002 (c)(4), 29 U.S.C. § 1001b(b) (Supp. IV 1986), it exercises its discretionary authority to terminate pension plans involuntarily only when the risk to participants and the insurance program leave it no other choice. In most cases, it is actions of the employer that give rise to that situation. Here, for example, LTV did everything it could to impel PBGC to terminate the Plans involuntarily. *See supra* at 7-8.

Ignoring the statute, the court of appeals focused on the one example mentioned in the legislative history—a favorable reversal of business trends—and concluded that restoration should be used only for that purpose. However, under *Chevron*, the lack of an express congressional intent to foreclose PBGC's authority means that the court is required to defer to the agency's interpretation of section 4047 so long as the follow-on policy is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see Mead Corp. v. Tilley*, 109 S. Ct. 2156, 2161-62 (1989) (*Chevron* principles applied to PBGC's interpretation of Title IV of ERISA). Given the broad language of Section 4047 and the PBGC's need to protect the pension insurance program from follow-on abuse, *see supra* at 13-14, it clearly was. Instead of examining that question, the court impermissibly used its foray into the legislative history as a vehicle for substituting its judgment for the broad discretion of the PBGC.

Compounding its error, the court went on to focus on Congress's failure to pass subsequently proposed legislation that would have prohibited the establishment of *any* new retirement arrangement, whether or not abusive, following plan termination. H.R. 3545, 100th Cong., 1st Sess. § 9511(e) (1987). Recognizing that this congressional inaction was "not applicable to the instant case," the court nevertheless relied on it to find a "continuing consensus not to include the establishment of follow-ons as a basis for a restoration decision." Pet. App. 18a. In doing so, the court far departed from traditional tools of statutory construction. *See Chevron*, 467 U.S. at 843 n.9. This Court's decisions make clear, for example, that subsequent legislative history is at best a "hazardous basis"

for inferring the intent of an earlier Congress. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304 (1960)). Further, congressional *inaction* "has no persuasive significance," as "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change." *United States v. Wise*, 370 U.S. 405, 411 (1962).

This misuse of legislative history and substitution of judgment led to vastly more than a technical legal error. As discussed in Section I, *supra*, the lower court's invalidation of the PBGC's policy against follow-on plans leaves the agency virtually powerless to safeguard public funds for use in cases of genuine need.[17]

B. A court may not substitute its judgment for PBGC's as to the appropriate considerations for restoration on the basis of improved financial circumstances.

The court below also substituted its judgment for the PBGC's regarding the second factor that the agency determined supported restoration of LTV's pension plans: the company's improved financial circumstances. The court replaced the agency's financial standard—whether the financial conditions necessitating termination continued to exist—with its own, and, in doing so, made restoration of any pension plan a virtual impossibility.

[17] The court of appeals also concluded that the administrative record did not support a finding that LTV's follow-on plans were "merely continuations of the old Plans." Pet. App. 19a. Again, the court did not apply the proper standard of review. The record contained the plans themselves, AR 230-303, and the affidavit of the agency's actuarial expert that these plans provide substantially the same benefits. AR 219. LTV did not choose to cross-examine the agency's expert for further explanation. AR 610. Indeed, as the district court found, LTV and the union "do not dispute that the 1987 [collective bargaining agreement] substantially achieved th[e] goal" of "the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated." Pet. App. 109a.

Although the court recognized that "improvement in financial circumstances is a basis for restoration," and conceded that "ERISA contains no standard" for judging the *degree* of financial improvement necessary to sustain a restoration decision, Pet. App. 21a, it scrutinized every detail of the PBGC's financial analysis, then rejected it in favor of its own. Misunderstanding the basis for PBGC's decision, the court concluded that restoration for improved financial circumstances may be based only on the "long term ability" of a company to fund its plan. Pet. App. 22a, 24a.[18]

This judicial overreaching interfered with precisely "the type of judgment which administrative agencies are best equipped to make and which justifies the use of

[18] The court of appeals compounded this error by concluding, contrary to the PBGC's analysis, that any amounts owed to a pension plan are pre-petition debts, not entitled to priority under bankruptcy law. Pet. App. 23a. This conclusion, however, is incorrect and contrary to existing case law. *E.g.*, *In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983); *Columbia Packing Co. v. PBGC*, 81 Bankr. 205 (D. Mass. 1988); *PBGC v. The Washington Group Inc.*, 8 Empl. Ben. Cas. (BNA) 1351 (M.D.N.C. 1987), *modified*, No. C-86-665-G, 1987 U.S. Dist. Lexis 5655 (M.D. N.C. May 29, 1987), *appeal dismissed*, Nos. 87-3079, 87-3129 (4th Cir. Jan. 10, 1989). If it is followed, employers in bankruptcy will generally be precluded by bankruptcy law from making the periodic contributions to their pension plans that ERISA requires. As a result, some plans that would otherwise continue will have to be terminated, because their assets will be depleted. Moreover, when a plan does terminate, the PBGC, which has always asserted priority status for at least a portion of its claims, will become merely a general unsecured creditor, entitled to share only in whatever value, if any, is left over after secured and priority creditors are paid. Thus, under the court of appeals' conclusion, termination is even less expensive than it otherwise would be, and the incentive to terminate increases accordingly.

the administrative process." *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947). The PBGC has been analyzing the financial condition of plans and employers since the agency's inception in 1974, and has determined through this experience that the kind of long-term predictions required by the lower court's decision simply cannot be made on a reliable basis. This became readily apparent when Congress was considering, and the PBGC studying, a risk-based premium. In a report prepared for Congress in 1987 after numerous in-depth studies, the PBGC determined, and its outside experts concurred, that predicting when the pension plans of particular companies will terminate is "essentially impossible." PBGC, *Promises at Risk* at 44, *reprinted in PBGC Proposal to Initiate a Variable Rate Premium System*, etc.: *Hearings Before the Subcomm. on Oversight of the House Committee on Ways and Means*, 100th Cong., 1st Sess. 52 (1987) (attachment to Statement of PBGC Executive Director Kathleen P. Utgoff). One of the PBGC's outside experts noted specifically "how hard it is to judge the ultimate ability of a troubled firm to survive." *Id.* at 43. For this reason, the PBGC recommended against a pension insurance premium based upon a company's ability to fund its plans. *See id.* at 49-57. Congress agreed.

In fact, the instant case demonstrates the inherent unreliability of long-term predictions of this type. Steel industry experts widely agreed in late 1986 that the industry would continue its then-prevalent downward trend. *See, e.g.*, Oppenheimer & Co., Inc., *Steel—Appropriate Methods of Demand Forecasting* (Nov. 1986), available on NEXIS, Company library, Ind. file. Almost uniformly, they failed to predict the dramatic improvements in the industry that began just a few months later, in early 1987. The PBGC's conclusion here thus "rest[ed] squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts," and should not have been disturbed. *Chenery*, 332 U.S. at 209; *see Batterton v. Francis*, 432 U.S. 416, 426 (1980).[19]

Here too, the lower court's overreaching has significant practical, as well as legal consequences. Just as the PBGC would not have been able to prove with any degree of reliability LTV's "long-term" ability to fund the pension plans in this case, it will be unable to do so in other cases, particularly in cyclical and volatile industries like steel. The court's imposition of its own standard thus drastically curtails—and perhaps eliminates—the PBGC's ability to restore pension plans, in spite of the statutory language directing it to do so when it considers restoration to be appropriate and consistent with its duties. *See* 29 U.S.C. § 1347.

C. Federal agencies are not required to subordinate their policy goals to inchoate policies underlying other laws.

Under the guise of determining whether PBGC had taken all relevant factors into consideration in arriving at its decision, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the court of appeals also rejected PBGC's decision because the agency did not subordinate its broad and specific authority under section 4047 to inchoate policies under the bankruptcy and labor laws. Pet. App. 14a-17a, 18a, 23a-24a. It concluded that the spirit of those laws foreclosed the

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[19] The authorities the court of appeals cited for imposing its own, long-term ability to fund standard (Pet. App. 24a-25a) are entirely inapposite. The prohibition in Title I of ERISA on "pay-as-you-go" funding does not relate to the duration of a plan's existence, but simply reflects Congress's concern that plans be reasonably funded for so long as they in fact exist. The provision of the Internal Revenue Code requiring plans to be "permanent" merely reflects the policy concern that employers not be able to maintain a plan only for so long as it is advantageous for tax purposes.

exercise of PBGC's express enforcement authority under section 4047.

The court of appeals' departure from traditional rules of analysis, which require a court to begin with the plain language of a statute, is fundamental and far-reaching. Section 4047 of ERISA grants the PBGC broad authority and discretion to restore previously terminated pension plans "in any . . . case in which the corporation determines such action to be appropriate and consistent with its duties under this title [IV]." 29 U.S.C. § 1347. Thus, "the intent of Congress is clear," and that should have been "the end of the matter." *Chevron*, 467 U.S. at 842-43.[20] Ignoring *Chevron* and Congress's broad delegation of authority, however, the court relied on bankruptcy and labor law policies to substitute its judgment for that of the agency.[21]

This Court has recognized that the Bankruptcy Code does not give a debtor "*carte blanche* to ignore nonbankruptcy law." *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502 (1986). Indeed, "[i]f Congress wishes to grant the

[20] As this Court has made clear, an agency's authority is limited to the area Congress entrusts it to regulate. *See Community Television of S. Calif. v. Gottfried*, 459 U.S. 498, 509-11 & n.17 (1983) (because the FCC's duties "derive from the Communications Act, not from other federal statutes," it is not responsible for enforcing the Rehabilitation Act); *NAACP v. FPC*, 425 U.S. 662, 670-71 & n.7 (1976) (Federal Power Commission's general duty to enforce the public interest does not require it to assume responsibility for enforcing legislation that is not directed at the agency).

[21] The court attempted to justify its holding by referring to ERISA § 514(d), 29 U.S.C. § 1144(d), which provides that "[n]othing in this title [Title I of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." Pet. App. 16a. However, the plain language of this section limits its applicability to Title I of ERISA, and there is no comparable provision in Title IV, which the PBGC is charged with enforcing.

trustee an extraordinary exemption from nonbankruptcy law, 'the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'" *Id.* at 501 (quoting *Swarts v. Hammer*, 194 U.S. 441, 444 (1904)). No such intent has been expressed here, either explicitly or implicitly. To the contrary, as the court of appeals itself recognized, Congress has granted regulatory enforcement actions like restoration an explicit exemption from bankruptcy law. Pet. App. 24a (agreeing with the district court that PBGC's action was exempt from the automatic stay in bankruptcy pursuant to 11 U.S.C. § 362(b)(4)). Similarly, this Court has refused to permit the interests underlying collective bargaining agreements to override federal law or policy. *See UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

Moreover, Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws, making it unnecessary—and inappropriate—for PBGC or the court of appeals to balance the spirit of other laws.[22] For example, a plan sponsor in bankruptcy reorganization may be able to terminate a pension plan voluntarily if it can demonstrate to the bankruptcy court that the company will not otherwise be able to reorganize. *See* 29 U.S.C. § 1341(c)(2)(B)(ii). The legislative history of Title IV makes clear that Congress considered bankruptcy policies in fashioning this test.[23] Congress also

[22] This is not a case where judicial intervention is necessary to reconcile a direct statutory conflict, *see, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (NLRB's enforcement of NLRA "would run directly counter to the express provisions of the Bankruptcy Code"), or to correct agency action that "trench[es] upon the . . . jurisdiction" of another agency. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962).

[23] "[T]he [House Education and Labor] Committee tried to balance the need to limit access to the insurance system to cases of genuine need against the danger of making the tests so stringent

specifically integrated labor law concerns by providing, in 29 U.S.C. § 1341(a)(3), that an employer may not terminate a pension plan voluntarily "if the termination would violate the terms and conditions of an existing collective bargaining agreement." *Id.*

Disregarding the efforts of the legislative branch, the court of appeals took it upon itself to balance bankruptcy and labor law policies against the plain language of section 4047. In doing so, the court has created significant practical difficulties for the PBGC and the multitude of other agencies that regulate companies which may be in bankruptcy or subject to collective bargaining requirements. Certainly, the enforcement authority of PBGC and other agencies may be affected by the court's creation of a safe harbor for otherwise impermissible actions that are the product of collective bargaining. Even more significant, however, is the notion that federal regulatory programs should be subordinated to a debtor's interest in reorganizing. The PBGC, for example, has a docket of more than 600 active bankruptcy cases, and is frequently faced with claims that Title IV should give way in the interests of facilitating a debtor's reorganization.[24] If permitted to stand, the court of appeals' decision will adversely affect the agency's ability to resist such claims. Other agencies dealing regularly with bankrupt employers may also be affected.

Finally, underlying the court of appeals' opinion is a doctrinal error with implications that are profound for the legal system as a whole—the supposition that a court

that nothing short of total liquidation would qualify for PBGC assistance." H.R. Rep. No. 241, 99th Cong., 1st Sess., pt. 2, at 49 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 707.

[24] For example, in an effort to reduce their liability to both plan participants and the PBGC, bankrupt companies sometimes argue that the Bankruptcy Code provision governing the rejection of executory contracts, 11 U.S.C. § 365, supersedes the provisions of Title IV, 29 U.S.C. §§ 1341, 1342, that govern the manner in which a pension plan may be terminated.

can derive a single controlling goal from statutes as complex as the Bankruptcy Code and the National Labor Relations Act. Both of these statutory schemes reflect a careful and deliberate effort by Congress to balance a multitude of conflicting interests. In the Bankruptcy Code, for example, Congress balanced the interests of debtors in being shielded from financial pressures with the interests of government agencies in enforcing their laws. *See* 11 U.S.C. § 362(a), (b)(4). Similarly, in the National Labor Relations Act, Congress balanced the interests of employers and unions in maintaining industrial peace through collective bargaining with, for example, the interests of society as a whole in preventing unreasonable restraints on trade. *See* 29 U.S.C. § 158(e). Without analysis, the court of appeals simply accepted one characterization of the purposes of these statutes and required PBGC to do likewise. Federal agencies will never be able to accomplish their statutory mandates if they are required to divine the underlying purposes of other statutory schemes and then give them unspecified weight in administering their own organic statutes. This aspect of the decision below alone warrants review.

D. A court may not impose on an agency procedural requirements not mandated by the due process clause, the agency's governing statute, or the Administrative Procedure Act.

In *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978), this Court made clear that where the due process clause is not implicated and an agency's governing statute contains no specific procedural mandates, the Administrative Procedure Act establishes the maximum procedural requirements a reviewing court can impose on agency rule-making. 435 U.S. at 524. As the Court stated, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."

Id. Thus, this Court "has for more than four decades emphasized that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Id.*

The PBGC properly exercised that discretion in this case. Its procedures, while informal, were thorough and fair. As discussed above, the PBGC made no secret of its objections to LTV's follow-on plans and repeatedly gave LTV the opportunity to present its side of the dispute or work out other arrangements. LTV, a sophisticated corporate entity that relied on numerous counsel, including special ERISA counsel, in all of its dealings with the PBGC, was in no way surprised or prejudiced by these procedures. In these circumstances, and particularly in light of the PBGC's need for prompt action to correct abuse of the pension insurance program and prevent other companies from following LTV's example, the court erred in rejecting the agency's procedures and imposing on PBGC's restoration authority procedural requirements approximating those prescribed for formal adjudication.

This case presents the question, not yet specifically addressed by this Court, whether the principles of *Vermont Yankee* apply to informal adjudications like the PBGC's action in this case. As the lower courts recognized, the PBGC is entitled to proceed by informal adjudication in reaching a restoration decision under section 4047. Pet. App. 26a, 120a. The APA does not impose any procedural requirements applicable to the informal adjudication in this case. Moreover, as the court of appeals acknowledged, section 4047 "does not discuss the procedures that are to be followed by PBGC when reaching a restoration decision." Pet. App. 26a. Finally, no protected liberty or property right was implicated by the restoration decision; none was asserted by LTV and none was identified by the court.

As this Court emphasized in *SEC v. Chenery Corp.*, imposing "rigid [procedural] requirement[s] . . . would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." 332 U.S. at 202. Moreover, "if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review w[ill] be totally unpredictable," and agencies will feel compelled to adopt full adjudicatory procedures in every instance in order to avoid reversal. *Vermont Yankee*, 435 U.S. at 546-47. This is precisely the effect of the decision below.

By failing to apply this Court's teachings in *Vermont Yankee* and imposing its own notion of the procedures required to ensure "fundamental fairness," the lower court has made judicial review, at least in that circuit, completely unpredictable. Plainly, the court's imposition of specific procedures raises the same concern with judicial encroachment upon congressionally-delegated agency discretion that underlay *Vermont Yankee*. The court below, moreover, is not alone in disregarding *Vermont Yankee*'s general principles. *See, e.g., American Trading Transportation Co., Inc. v. U.S.*, 841 F.2d 421, 425 (D.C. Cir. 1988) (specifying particular procedures required for informal adjudication); *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982) (same, characterizing *Vermont Yankee*'s prohibition on court-required procedural devices as "dictum"); *but see Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338-39 (D.C. Cir. 1989) (while precise holding of *Vermont Yankee* is inapplicable to informal adjudication, its general principles "would simply forbid" reviewing court from imposing upon the agency specific procedural steps that must be followed in order to create a reviewable record). If this trend is permitted to continue, agencies may well seek to protect their decisions by implementing

procedures more appropriate to judicial proceedings, thereby "stultify[ing] the administrative process." *Chenery*, 332 U.S. at 202.

CONCLUSION

The petition for certiorari should be granted.

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